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No. 02-204

In The

Supreme Court of the United States

RODOSVALDO POZO,

Petitioner,

v.

GARY McCAUGHTRY, RANDALL GERRITSON, and DAVID HAUTAMAKI,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

JAMES E. DOYLE
Attorney General

KARLA Z. KECKHAVER*
Assistant Attorney General
Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6365
**Counsel of Record*

31 pp

QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeal's decision, which holds that for a prisoner to exhaust administrative remedies as required by 42 U.S.C. § 1997e(a), the Prisoner Litigation Reform Act ("PLRA") exhaustion requirement, he must complete the administrative process by following the rules the state has established for that process, (1) is consistent with this Court's decisions regarding the purpose and broad application of the PLRA exhaustion requirement, (2) is consistent with other court of appeals' decisions addressing the effect of state procedural rules on the PLRA exhaustion requirement, and (3) is analogous to this Court's and other court of appeals' decisions regarding procedural default in the context of the habeas corpus exhaustion requirement.

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BRIEF IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

The Respondents are satisfied with sections A through E of the Petitioner's Statement of the Case; however, the Respondents do not agree with the introductory paragraphs of the Petitioner's Statement of the Case because such paragraphs essentially amount to a summary of the argument.

REASONS FOR DENYING THE WRIT

Summary

This Court should deny the petition for writ of certiorari because the Seventh Circuit properly concluded that for a prisoner to exhaust administrative remedies as required by the PLRA, he must complete the process by following all the rules the state has established for that process. Without such a rule, an inmate could evade the exhaustion requirement by filing no administrative grievance or by filing an untimely or otherwise improper grievance and later claiming that no remedy is available; therefore, the rule is necessary to protect the integrity of administrative exhaustion and to protect the important interests served by procedural rules.

Argument

I. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS REGARDING THE PURPOSE AND BROAD APPLICATION OF THE PLRA EXHAUSTION REQUIREMENT.

A rule requiring prisoners to properly exhaust their administrative remedies, without violating the established procedures for administrative exhaustion, is necessary to protect the purpose and broad application of the PLRA exhaustion requirement as discussed by this Court in *Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983 (2002) and *Booth v. Churner*, 532 U.S. 731 (2001).

The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 ("PLRA"), requires inmates to exhaust their available administrative remedies before bringing a 42 U.S.C. § 1983 action with respect to prison conditions. The relevant section of the PLRA, 42 U.S.C. § 1997e(a), reads as follows:

> **Applicability of administrative remedies.** No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

Before § 1997e(a) was amended by the PLRA, a court had discretion, but was not obligated, to require an inmate to exhaust available administrative remedies, but only if those remedies were "plain, speedy, and effective." 42 U.S.C. § 1997e(a) (1994 ed.). The PLRA significantly broadened the previous exhaustion rule by making exhaustion mandatory and by eliminating the condition that the remedy be "plain, speedy, and effective." *See Porter*, 122 S.Ct. at 990-91; *Booth*, 532 U.S. at 739.

In recent decisions, this Court has interpreted § 1997e(a) broadly. In *Booth*, this Court held that the PLRA requires administrative exhaustion, even when the prison grievance system does not offer the relief requested by the prisoner. *See Booth*, 532 U.S. at 741.

> Congress's imposition of an obviously broader exhaustion requirement makes it highly implausible that it meant to give prisoners a

> strong inducement to skip the administrative grievance process simply by limiting prayers for relief to money damages not offered through the administrative grievance mechanisms.

Id. at 740-41.

In *Porter*, this Court held that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter*, 122 S.Ct. at 992. As in *Booth*, the Court reasoned that when Congress imposed a broader PLRA exhaustion requirement, it is unlikely that it meant to give prisoners an opportunity to evade the exhaustion requirement by altering their pleadings.

> Nussle urges that his case could be placed in the isolated episode category, but he might equally urge that his complaint describes a pattern or practice of harassment climaxing in the alleged beating. It seems unlikely that Congress, when it included in the PLRA a firm exhaustion requirement, meant to leave the need to exhaust to the pleader's option. Cf. *Preiser* [*v. Rodriguez*, 411 U.S. 475, 489-90 (1973)] ('It would wholly frustrate explicit congressional intent to hold that [prisoners] could evade this [exhaustion] requirement by the simple expedient of putting a different label on their pleadings.').

Id. at 991.

This case presents a problem similar to those addressed in *Booth* and *Porter*. Pozo did not follow the rules established by the state for administrative exhaustion when he failed to timely present his claims on administrative appeal. Administrative review by the Corrections Complaint Examiner ("CCE") was not "available" because of Pozo's own negligence in failing to timely file his appeals. Pozo should not be permitted to wait until the time limit for appeal expires and then claim that he has no available administrative remedies. Administrative review *was* available to him within 10 days of the Warden's decision. *See* Wis. Admin. Code § DOC 310.13(1). Pozo chose to ignore that time limit, and he should not now benefit from failing to give prison officials a fair opportunity for timely review. If prisoners could exhaust their administrative remedies by flouting the rules established for the process, as Pozo did, they could evade the exhaustion requirement by filing no administrative grievance or by filing an untimely or otherwise improper grievance and later claiming that no remedy is available. Surely, this is not the result that Congress intended when it imposed a broader exhaustion requirement.

In addition, the purpose of administrative exhaustion requires that inmates properly exhaust their administrative remedies, following all the state-established rules for exhaustion. Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner lawsuits. *See Porter*, 122 S.Ct. at 988. The exhaustion requirement gives prison officials the opportunity to address a situation internally, restricts frivolous claims, develops the factual record, and reduces the scope of litigation. *See id.* Administrative review provides for a timely investigation by those in the best position to respond to the allegations. It may narrow the dispute or resolve the matter entirely. These goals can only be met when prison officials are given a fair

opportunity to address the merits of the claim. Time limits for administrative review, as well as other procedural rules, have a purpose: to provide review soon after the incident in question when facts are fresh in the minds of those involved and when evidence is likely to be available. Prison officials are entitled to rely on administrative time limits and are not required to waive time limits to facilitate exhaustion. It would be contrary to the purpose of administrative time limits and of exhaustion generally if the rule were otherwise.

II. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH OTHER COURT OF APPEALS' DECISIONS ADDRESSING THE EFFECT OF STATE PROCEDURAL RULES ON THE PLRA EXHAUSTION REQUIREMENT.

Several other circuits have addressed the situation at issue in this case, and all of those circuits reached the same conclusion as the Seventh Circuit. *See Harper v. Jenkin*, 179 F.3d 1311 (11th Cir. 1999); *Wright v. Morris*, 111 F.3d 414, 417 n. 3 (6th Cir. 1997); *Marsh v. Jones*, 53 F.3d 707, 710 (5th Cir. 1995).

In *Harper*, the Eleventh Circuit addressed a situation similar to the case at bar. The court held that an inmate did not exhaust his administrative remedies as required by the PLRA because he filed an untimely grievance and did not seek leave to file an out-of-time grievance with the grievance coordinator, who could waive the time limit for "good cause." *Harper*, 179 F.3d at 1312. The court reasoned as follows:

> If we were to accept the appellant's position-that the filing of an untimely grievance exhausts an inmate's administrative remedies-inmates such as appellant, could ignore the PLRA's exhaustion requirement and still gain access to federal court merely by filing an untimely grievance.

Id.

The Seventh Circuit's holding in this case is consistent with the Eleventh Circuit's holding in *Harper*. In both cases, the courts concluded that the inmate failed to exhaust his administrative remedies because he did not follow the rules established by the state for administrative review. Moreover, in both cases, the courts concluded that the inmate defaulted his claim, even though the administrative reviewer had discretion to waive the time limit. *See* Wis. Admin. Code § DOC 310.13(3) (CCE may accept a late appeal "if the elapsed time has not made it difficult or impossible to investigate the complaint."); *see also* § DOC 310.09(3) ("the institution complaint examiner may accept a late complaint for good cause"). Neither court required the administrative reviewer to state why he or she was *not* waiving the time limit rule.

While other circuits have not directly addressed the effect of state procedural rules on the PLRA exhaustion requirement, other circuits have addressed the issue in dicta.

In *Wright*, the Sixth Circuit concluded that the PLRA could not be applied retroactively, but in a footnote, the court addressed facts similar to this case.

> Plaintiff Corley filed an administrative complaint but did not appeal the denial of that complaint to the highest possible administrative level. He argues that because the time for his final administrative appeal is long past, there is no longer any administrative process available to him and he has therefore met the exhaustion requirement.... In light of our holding in this case, we need not address this argument. It is clear, however, that in the usual case in the future, where the alleged violations occurred after the PLRA's enactment, and inmates have both notice that exhaustion is required and a reasonable opportunity to file complaints, it would be contrary to Congress's intent in enacting the PLRA to allow inmates to bypass the exhaustion requirement by declining to file administrative complaints and then claiming that administrative remedies are time-barred and thus not then available.

Wright, 111 F.3d at 417 n. 3.

Similarly, even under the old exhaustion rule, which required "plain, speedy, and effective" administrative remedies, the Fifth Circuit concluded as follows:

> The district court dismissed Marsh's case under section 1997e. Because the prison had already rejected Marsh's administrative grievance as untimely, her administrative remedies were foreclosed, and a continuance would have served no purpose. When a section 1997e continuance would serve no purpose, a district court still has the power to

> dismiss a prisoner's suit under section 1997e for failure to exhaust administrative remedies. The reasoning of *Rocky* [*v. Vittorie*, 813 F.2d 734 (5th Cir. 1987)] applies in this context. Without the prospect of a dismissal with prejudice, a prisoner could evade the exhaustion requirement by filing no administrative grievance or by intentionally filing an untimely one, thereby foreclosing administrative remedies and gaining access to a federal forum without exhausting administrative remedies. *Rocky*, 813 F.2d at 736. Thus, we hold that a district court has the power to dismiss a prisoner's section 1983 suit under section 1997e even when administrative relief is time-barred or otherwise precluded.

Marsh, 53 F.3d at 710.

Thus, the rule of exhaustion implemented by the Seventh Circuit has been adopted, or at least contemplated, by other circuits.

III. THE SEVENTH CIRCUIT'S DECISION IS ANALOGOUS TO THIS COURT'S AND OTHER COURT OF APPEALS' DECISIONS REGARDING PROCEDURAL DEFAULT IN THE CONTEXT OF THE HABEAS CORPUS EXHAUSTION REQUIREMENT.

A. Procedural default is a useful analogy to the issue presented in this case, but the rules of procedural default are unnecessary or inapplicable in the context of the PLRA exhaustion requirement.

The Seventh Circuit's decision is analogous to the doctrine of procedural default as discussed in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), but the Seventh Circuit could have reached its decision without addressing procedural default; therefore, any conflict with the rules of procedural default is not a valid basis for review of this case.

Federal habeas corpus, like the PLRA, has an exhaustion requirement. A federal habeas applicant must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State ... if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). State prisoners must give the state courts a "*fair* opportunity to act on their claims"

before filing a federal habeas action. *O'Sullivan*, 526 U.S. at 844. Because the habeas exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the state's established appellate review process. *See id.* at 845.

The related doctrine of procedural default protects the integrity of the exhaustion rule. *See id.* at 848.

> In order to protect the integrity of our exhaustion rule, we have also crafted a separate waiver rule, or--as it is now commonly known--the procedural default doctrine. The purpose of this doctrine is to ensure that state prisoners not only become ineligible for state relief before raising their claims in federal court, but also that they give state courts a sufficient opportunity to decide those claims before doing so. If we allowed state prisoners to obtain federal review simply by letting the time run on adequate and accessible state remedies and then rushing into the federal system, the comity interests that animate the exhaustion rule could easily be thwarted. We therefore ask in federal habeas cases not only whether an applicant has exhausted his state remedies; we also ask how he has done so. This second inquiry forms the basis for our procedural default doctrine: A habeas petitioner who has concededly exhausted his state remedies must also have *properly* done so by giving the State a fair 'opportunity to pass upon [his claims].'

> When a prisoner has deprived the state courts of such an opportunity, he has procedurally defaulted his claims and is ineligible for federal habeas relief save a showing of 'cause and prejudice,' or 'a fundamental miscarriage of justice.'

Id. at 853-54 (Stevens, J., dissenting) (internal citations omitted).[1]

The doctrine of procedural default also protects the important interests served by procedural rules. In *Murray v. Carrier*, 477 U.S. 478 (1986), this Court emphasized the important interests served by state procedural rules at every stage of the judicial process and the harm to the states that results when federal courts ignore these rules:

> 'A State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack...' 'Each State's complement of procedural rules ... channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.'... Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review the trial error, and 'undercut[s] the State's ability to enforce its procedural rules.'

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[1] The majority in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), agreed with Justice Stevens' general description of the law of exhaustion and procedural default. *See id.* at 848. The majority only disagreed with the dissent's conclusion that a prisoner's failure to present his claims in a petition for discretionary review to a state court does not result in a procedural default of those claims. *See id.* at 848-49.

Id. at 490-91 (internal citations omitted); *see also Coleman v. Thompson*, 501 U.S. 722, 748-49 (1991).

The purpose of exhaustion under 28 U.S.C. § 2254, the exhaustion requirement for federal habeas actions, is to allow state courts the first opportunity to review the claim and provide any necessary relief. *See O'Sullivan*, 526 U.S. at 844. Similarly, one of the purposes of exhaustion under 42 U.S.C. § 1997e(a), the PLRA exhaustion requirement, is to give prison officials the opportunity to address a situation internally. *See Porter*, 122 S.Ct. at 988. Both exhaustion doctrines require the federal courts to give the state tribunal a "*fair* opportunity to act on their claims" before filing a federal action. *See O'Sullivan*, 526 U.S. at 844. Because the doctrine of procedural default is designed to protect this "fair opportunity," *see id.* at 853-54 (Stevens, J., dissenting), it is equally applicable to the PLRA exhaustion requirement.

In addition, a procedural default rule is necessary to protect the important interest served by procedural rules. The administrative reviewers are entitled to rely on their procedural rules. Once the CCE has determined that he will not accept an untimely appeal because the elapsed time has made it difficult or impossible to investigate the complaint, *see* Wis. Admin. Code § DOC 310.13(3), the court must respect that determination. Other procedural rules, such as the ICE's decision not to accept an untimely complaint because the inmate failed to show good cause for the delay, *see* Wis. Admin. Code § DOC 310.09(5), are deserving of the same respect. Therefore, a rule analogous to procedural default is necessary to protect the integrity of the PLRA exhaustion requirement because without such a rule, an inmate could evade the exhaustion requirement by filing no administrative grievance or by filing an untimely or otherwise improper grievance.

The Seventh Circuit recognized that procedural default provides a useful analogy to the issue presented in this case, but it could have reached its decision without addressing procedural default. (See Sections I and II of this Brief). Therefore, the Seventh Circuit did not address all the rules for procedural default in reaching its decision, and any conflict with those rules is not a valid basis for review of this case.[2]

Pozo argues that Seventh Circuit "has made the administrative exhaustion requirement considerably more difficult to satisfy than the habeas exhaustion requirement." (Pet. for Cert., p. 13). But it should be. The PLRA does not apply to habeas corpus actions because the PLRA's requirements for access to federal court are more stringent than similar requirements for habeas corpus actions. *See Walker v. O'Brien*, 216 F.3d 626, 633-37 (7th Cir. 2000); *Davis v. Fechtel*, 150 F.3d 486, 488-90 (5th Cir. 1998); *Blair-Bey v. Quick*, 151 F.3d 1036, 1039-42 (D.C. Cir. 1998); *McIntosh v. United States Parole Board*, 115 F.3d 809, 811-12 (10th Cir. 1997). The PLRA was intended to reduce frivolous and abusive civil rights actions brought by prisoners. *See Blair-Bey*, 151 F.3d at 1040; *McIntosh*, 115 F.3d at 811. While a civil rights action attacks the conditions of the prisoner's confinement and requests monetary compensation for such conditions, a habeas corpus proceeding attacks the fact or duration of a prisoner's confinement and seeks the remedy of immediate release or a shortened period of confinement. *See McIntosh*, 115 F.3d at

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[2] Some of the rules for procedural default are unnecessary or inapplicable in the context of the PLRA exhaustion requirement context. (See Sections III.B. and III.C. of this Brief). For example, the "fundamental miscarriage of justice" exception to procedural default, which requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent, does not apply outside of a criminal context. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

812. More is at stake with a habeas corpus action, and as such, there is a long tradition of ready access of prisoners to federal habeas corpus, as distinct from their access to tort remedies. *See Blair-Bey*, 151 F.3d at 1040-41. Therefore, the PLRA exhaustion requirement is, and should be, stricter than the habeas corpus exhaustion requirement.

In summary, the Seventh Circuit's decision, that an inmate's failure to properly raise his claims at the administrative level bars federal review of those claims, is necessary to protect the integrity of the PLRA exhaustion requirement and to protect the important interests served by procedural rules generally. Although the rule is analogous to procedural default, the PLRA exhaustion requirement is stricter than the habeas corpus exhaustion requirement and not all the rules of procedural default are necessary or applicable in this context.

B. Even if the rules of procedural default apply in the context of the PLRA exhaustion requirement, Pozo procedurally defaulted his claim because the administrative reviewer dismissed his appeal based upon an independent and adequate state procedural rule.

In the analogous situation of federal habeas corpus actions under 28 U.S.C. § 2254, federal habeas relief is barred if the state court declined to reach the merits of the petitioner's claim because of a procedural default and that default constituted an independent and adequate state-law

ground for the disposition of the case. *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *Thomas v. McCaughtry*, 201 F.3d 995, 1000 (7th Cir. 2000). The procedural rule at issue in this case meets these requirements.

A state court's decision is independent if that court actually relied on the procedural bar as an independent basis for its disposition of the case, and it clearly and expressly stated that its judgment rests on a state procedural bar. *See Harris v. Reed*, 489 U.S. 255, 261-63 (1989). A state court's finding of procedural default is adequate if the procedural rule is "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). The procedural rule must be applied in a "consistent and principled way"; it cannot be employed "infrequently, unexpectedly, or freakishly." *Lilly v. Gilmore*, 988 F.2d 783, 785 (7th Cir.), *cert. denied*, 510 U.S. 852 (1993); *Barksdale v. Lane*, 957 F.2d 379, 382 (7th Cir.), *cert. denied*, 506 U.S. 890 (1992); *see also Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988) (procedural bar must be consistently or regularly applied); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (procedural bar cannot be applied with "pointless severity"). If a prisoner could not have been deemed to have been apprised of the rule's existence at the time he omitted the procedural step, the state court's judgment is not an adequate ground that would bar federal habeas review. *See Ford v. Georgia*, 498 U.S. 411, 423 (1991); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958).

In this case, the CCE relied upon an independent and adequate procedural rule in dismissing Pozo's administrative appeals. The CCE's reasons for dismissal were independent because he did not address the merits of the appeal and, instead, clearly and expressly stated that the appeals were dismissed as untimely pursuant to Wis. Admin. Code § DOC

310.13(1). The reasons for dismissal were adequate because the time limit for appeal to the CCE under § DOC 310.13(1) was firmly established, such that Pozo was notified of the rule's existence, at the time he received the adverse decisions from the warden and at the time he filed his appeals to the CCE.

Pozo argues that the CCE was "free to apply or ignore [the time limit rule] at whim" because the rule is subject to an exception whereby the CCE may review the merits of an appeal, despite an untimely filing, if the elapsed time has not made it difficult or impossible to investigate the complaint. (Pet. for Cert., p. 12). Pozo further argues that the rule would be adequate if (1) Wisconsin legislators adopted timeliness rules "that are more certain in their application"; or (2) Wisconsin prison officials refusing to hear appeals found "explicitly that § 310.13(3) cannot be invoked to allow a late appeal because the passage of time has rendered it 'difficult' or 'impossible' to consider the inmate's grievance." (Pet. for Cert., p. 13).

Contrary to Pozo's arguments, the fact that the time limit rule is subject to a discretionary exception does not mean that the rule is applied at whim. Wisconsin Admin. Code § DOC 310.13(1) provides a clear time limit for appeal to the CCE. Section DOC 310.13(3) provides an exception, which allows the CCE to review the merits of an appeal, despite an untimely filing, if the elapsed time has not made it difficult or impossible to investigate the complaint. The only way for the rule to be "more certain in [its] application," (Pet. for Cert., p. 13), would be if it were not subject to any exception at all. But, the fact that it is subject to a discretionary exception does not render the rule inadequate.

> [P]rocedural rules need not be utterly mechanical. That the application of a rule

> requires the exercise of judicial discretion does not render the rule inadequate to support a state decision. In fact, a bright-line rule for delay can operate more harshly than a discretionary rule.

Morales v. Calderon, 85 F.3d 1387, 1392 (9th Cir. 1996). Similarly, if a firmly established procedural rule is subject to an exception, which the state court impliedly rejects by relying solely on the general procedural rule, the state court cannot be said to have acted unexpectedly or freakishly. *See Thomas*, 201 F.3d at 1003-05.

In addition, there is no requirement that the CCE state why he or she is not applying the time limit exception. When the CCE dismisses a complaint as untimely under the general procedural rule in § DOC 310.13(1), nothing in the code requires him to explicitly state why he is *not* employing the exception in § DOC 310.13(3) or to show that the elapsed time *has* made it difficult or impossible to investigate the complaint. Neither the discretion afforded the CCE in the application of the exception nor the fact that he implicitly rejects the exception when he relies solely on the general procedural rule renders the rule inadequate to support the administrative decision. *See Morales*, 85 F.3d at 1392; *Thomas*, 201 F.3d at 1003-05.

Pozo also urges this court to accept review of this case because he contends that the Seventh Circuit's decision conflicts with the Ninth Circuit's decision in *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996). As discussed above, *Morales* is consistent with the Seventh Circuit's decision because the Ninth Circuit concluded that the exercise of discretion does not *per se* render the rule inadequate. *See id.* at 1387. Even though the Ninth Circuit determined that the California rule in question was not an

adequate state ground sufficient to support a procedural default, the California rule is so different from the rule at issue in this case that the cases cannot be said to be in conflict.

The best way to illustrate the difference between the rule at issue in *Morales* and the rule at issue in this case is to quote the California rule:

> 1. Timeliness standards
> 1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. All petitions for writs of habeas corpus should be filed *without substantial delay.*
> 1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 days after the final due date for the filing of appellant's reply brief on the direct appeal.
> 1-1.2. A petition filed more than 60 days after the final due date for the filing of appellant's reply brief on the direct appeal *may* establish absence of substantial delay if it alleges *with specificity* facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim.
> 1-1.3. Alternatively, a petition *may* establish absence of substantial delay if it alleges *with specificity* facts showing that although petitioner or counsel was aware of the factual

> and legal bases for the claim before January 16, 1986, the petition was filed within a *reasonable time* after that date.
> 1-2. If a petition is filed after substantial delay, the petition must demonstrate *good cause* for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.
> 1-3. Any petition that fails to comply with these requirements *may* be denied as untimely.

Id. at 390 (quoting Supreme Court Policies Regarding Cases Arising from Judgments of Death, in California Rules of Court - State 745-46 (1990)) (internal citations and footnotes omitted).

The Ninth Circuit concluded that this rule was not an adequate state ground sufficient to support a procedural default because it was not "clear, consistently applied, and well-established." *Id.* at 1393. The rule was vague because

> [n]either the Standards nor [subsequent cases] however, established what amount of delay would be considered 'substantial,' nor did either set out criteria for determining 'good cause' to excuse such delay. They also did not prescribe whether and when untimeliness might be waived altogether, even though good cause had not been shown.

Id. at 1391. The rule was inconsistently applied because there was so much variation in the application of the rule that no discernable clear rule existed for cases filed beyond the

time limit. *See id.* Thus, both the rule and its exception were unclear and inconsistently applied.

Unlike the California rule at issue in *Morales* which requires petitions to be filed "without substantial delay," Wis. Admin. Code § DOC 310.13(1) provides a clear 10-day time limit for appeal to the CCE. Because the time limit is unambiguous, there is no need for the CCE to address the exception unless he or she intends to invoke it and review the merits. Moreover, there is no evidence in the record that the CCE applies the exception inconsistently or that the CCE waives the time limit for other reasons. Therefore, because the rules at issue are so materially different, this case is not inconsistent with *Morales*.

C. Pozo has waived his argument that his default is excused if cause and prejudice are demonstrated because he failed to raise this argument on appeal to the Seventh Circuit.

Pozo argues that review is warranted because the Seventh Circuit's decision cannot be reconciled with the long line of habeas exhaustion cases holding that a petitioner's procedural default may be excused upon a showing of cause and prejudice. (Pet. for Cert., p. 15). Pozo did not raise the "cause and prejudice" argument on appeal to the Seventh Circuit, nor did he present any facts which would excuse Pozo's procedural default. Therefore, he has waived review of this issue herein. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Moreover, the "cause and prejudice" exception to procedural default is not directly applicable because there is

no substantial compliance or good faith exception to the PLRA exhaustion requirement, *see Smith v. Zachary*, 255 F.3d 446, 452 (7th Cir. 2001); *Wolff v. Moore*, 199 F.3d 324, 327 (6th Cir. 1999), and because the administrative time limits in Wisconsin have exceptions built into the rules, *see* Wis. Admin. Code §§ DOC 310.09(3), 310.13(3), so inmates are required to raise their reasons for default at the administrative level, which Pozo did not do. *See Buelow v. Dickey*, 847 F.2d 420, 426 (7th Cir. 1988) (petitioner waived ineffective assistance of counsel as cause for procedural default by failing to raise the contention in state court).

CONCLUSION

For the reasons set forth above, this Court should deny the petition for writ of certiorari.

Dated this 11th day of September, 2002.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

KARLA Z. KECKHAVER*
Assistant Attorney General
Counsel of Record

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6365